

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-5019

United States Court of Appeals FOR THE SECOND CIRCUIT

Consolidated Appeals:
77-5019, 77-5022

In the Matter of
STIRLING HOMEX CORPORATION,

Debtor.

GREGORY JEZARIAN, GERALDINE JEZARIAN, LONETOWN COMPANY, HARRY E. JONES, ALECK GOLDBERG, as Custodian for Mark Goldberg, and Mrs. D. WINDSOR DIXON,

Appellants,

FRANK G. RAICHLE, Reorganization Trustee; LINCOLN FIRST BANK OF ROCHESTER; CHEMICAL BANK; THE CHASE MANHATTAN BANK, N.A.; THE FIRST NATIONAL BANK OF CHICAGO; MARINE MIDLAND BANK; and THE TRAVELERS INDEMNITY COMPANY,

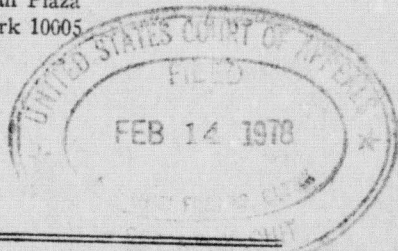
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE THE CHASE MANHATTAN BANK, N.A.

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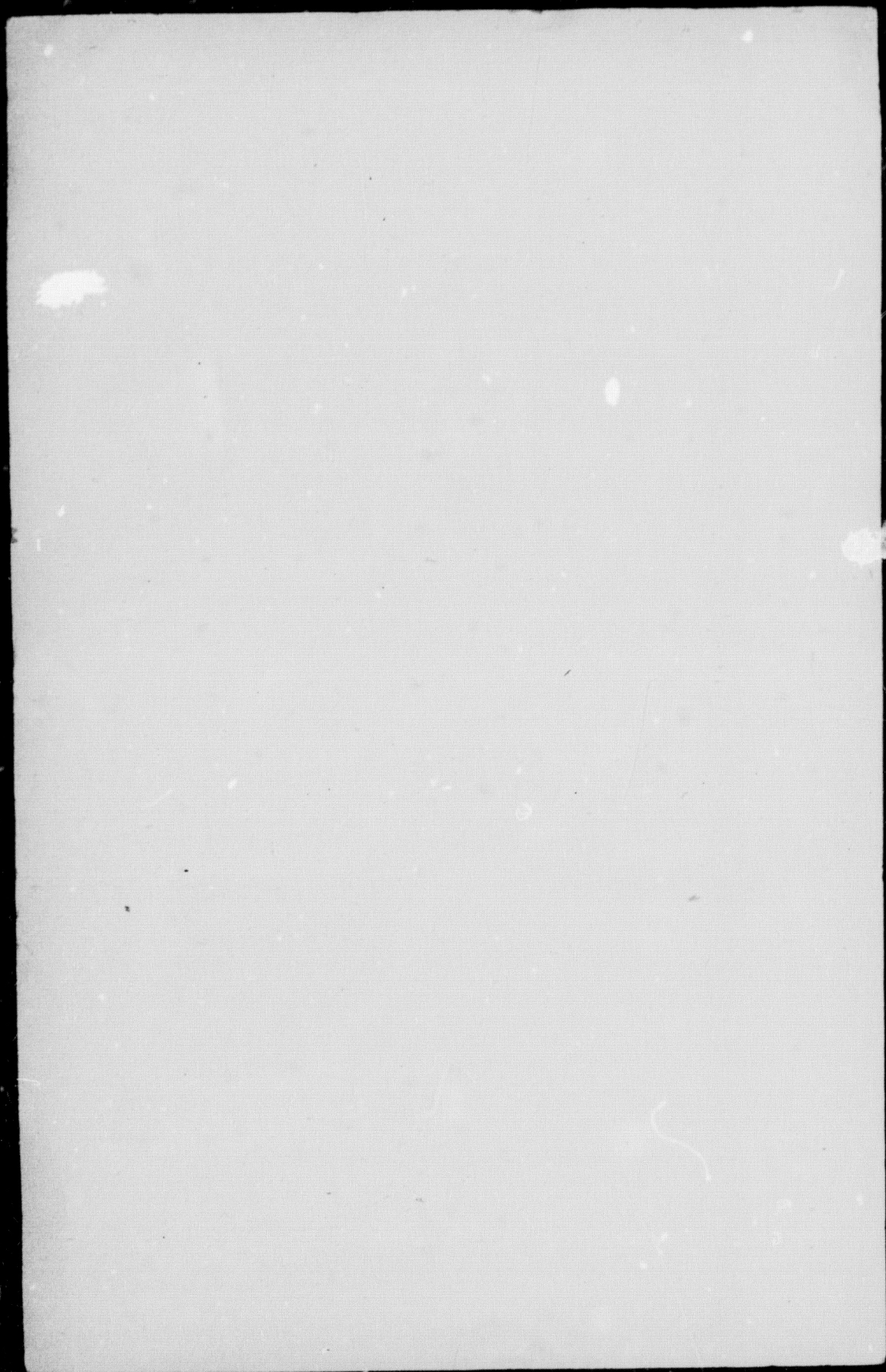


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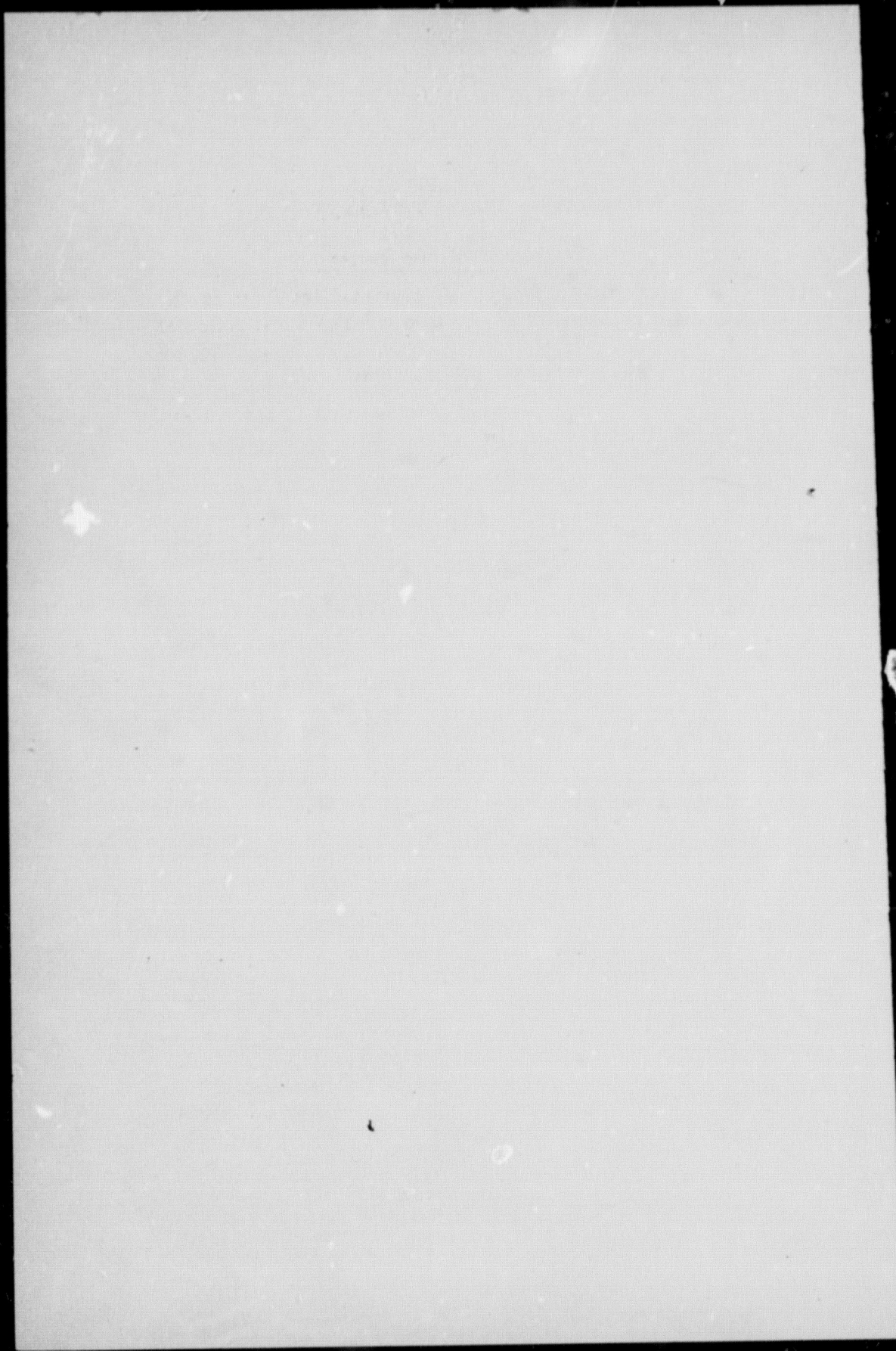
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**BRIEF OF APPELLEES
THE CHASE MANHATTAN BANK, N.A.**

Statement of the Issues

We adopt the statement of the issues set forth in the brief of Appellees, Chemical Bank and The First National Bank of Chicago. However, to conserve judicial time, we address in this brief only the following issues:

1. Did the lower court err in ruling that equity holders of the insolvent debtor cannot elevate their status for distribution of estate assets—and share equally with general creditors—by claiming that they were defrauded?

2. Can equity holders of the insolvent debtor elevate their status for distribution of estate assets and take distributions before certain general creditors, by arguing before this Court for the first time that the claims of those general creditors should be equitably subordinated to the claims of allegedly defrauded equity holders?

Statement of the Case

We adopt the statement of the case set forth in the brief of Appellees, Chemical Bank and The First National Bank of Chicago and limit the within statement to those matters which are relevant to the limited issues addressed by this brief.

Sales of Public Securities.

In 1970 and 1971, Stirling, which was in the business of constructing and selling modular homes, made two offerings of securities to public investors. In February, 1970, Stirling sold 400,000 shares of common stock at \$16.50 per share and received net proceeds of approximately \$6,100,000, which funds were used by Stirling as working capital (A. 157, 158).¹ This common stock traded from highs of \$50.00

¹ "A" refers to the Joint Appendix, Volumes I and II.

per share to lows of \$6.00 per share (A. 157, 438). On July 29, 1971, Stirling sold 500,000 shares of convertible preferred stock at 40 per share and used the proceeds of the sale to reduce outstanding short-term borrowings (A. 157, 158, 282, 346, 248, 422). The record does not disclose the highs and lows at which the convertible preferred stock traded.

Chapter X Proceedings and Claims.

After suffering a substantial decline in its sales, Stirling filed a petition under Chapter X of the Bankruptcy Act on July 13, 1972 (A. 146).

Approximately \$50,500,000 of general claims have been filed against Stirling and its subsidiaries. Of that amount, \$38,073,167.88 represent claims by bank lenders, of which \$4,102,659.53 was owed to Chase. The claims of the Banks were secured under a Revolving Credit Agreement dated as of January 24, 1972. The perfection of the Banks' security interest was disputed by the Trustee and this dispute was settled (A. 108). Prior to the effective date of the Revolving Credit Agreement Chase and the other banks made short-term loans to Stirling under unsecured lines of credit. Included among the other claims are 559 claims of former employees for wages and expenses in the aggregate amount of \$1,571,623.70, and claims by miscellaneous persons claiming creditor status of approximately \$8,000,000 (A. 167-168). Stockholder claims arising out of the "fraud" are alleged to be \$100,000,000 (A. 219).

Insolvency, Classification of Claims and Appeal.

Pursuant to an Order dated June 13, 1977, the Court found that the fair value of Stirling's assets was \$16,986,376 and that the aggregate amount of Stirling's general creditor debt was \$45,961,000 (A. 267). On the basis of such findings, the Court determined that Stirling was insolvent

and ordered the Trustee to prepare and submit to the Court a plan in the nature of an orderly liquidation of Stirling's remaining assets (A. 266-267). The Court reserved for further Order the extent to which stockholders might be permitted to participate (A. 268).

On July 27, 1977, the Court entered an Order determining that claims of stockholders, including allegedly defrauded stockholders, should not be classified on a parity with the claims of conventional general creditors (A. 440) ("Classification Order").

Appellants seek to have the Classification Order reversed on the ground that it improperly classified appellants and other similarly situated stockholders. Although appellants did not raise the issue below, they also seek to have the Classification Order reversed on the ground that the claims of the Banks, including Chase, should be equitably subordinated to the claims of allegedly defrauded stockholders.

POINT I

The Court below properly classified shareholder fraud claimants as junior to general unsecured creditors.

A. Cases Cited by Appellants Do Not Support Their Position.

Appellants flatly state in Point I of their brief that "the controlling authorities uniformly rank defrauded stockholders with conventional general creditors." Appellants cite six cases in support of that proposition. *In re Credit Industrial Corp.*, 366 F.2d 402 (2nd Cir. 1966); *In re Four Seasons Nursing Centers of America, Inc.*, 472 F.2d 747 (10th Cir. 1973); *In re Equity Funding Corp. of America*, 416 F.Supp. 132 (C.D. Cal. 1975); *In re Los Angeles Land and Investments, Ltd.*, 282 F.Supp. 448 (D. Hawaii 1968), *aff'd on other grounds*, 447 F.2d 1366 (9th Cir. 1971);

Securities and Exchange Commission v. Insurance Investors Trust Co., [1971-1972] Fed. Sec. L. Rep. (CCH) ¶ 93,259 (W.D. Ky. 1971); and *Oppenheimer v. Harriman National Bank & Trust Co.*, 301 U.S. 206 (1937). Such a gross generalization is simply not supportable and in any event is not applicable to Chapter X cases where the absolute priority rule must be applied.

In re Credit Industrial Corp., *supra*, a bankruptcy case decided by this Court, did not address the issue whether the claims of defrauded stockholders are entitled to parity with the claims of unsecured creditors in respect of distributions from a debtor's estate.

In *Four Seasons* and *Equity Funding*, both Chapter X cases, general creditors consented to plans of reorganization which classified stockholder fraud claimants separately from general unsecured creditors and afforded such stockholder claimants some marginal recovery in respect of their fraud claims. These settlements were made and approved by the courts in recognition of the absence of clear precedents in this area. In each case, the defrauded stockholder claimants were in a position to threaten extended litigation over the priority to be accorded stockholder and general creditor claims. Such litigation would have delayed confirmation of a plan of reorganization and thereby would have postponed distributions to ordinary unsecured creditors. In neither of these cases did the court find that defrauded stockholders ranked on a parity with other creditors and in later cases, allegedly defrauded stockholders received substantially less than ordinary creditors.*

* As Mr. Block stated in his oral argument before Judge Burke:

"Now in all other reorganizations . . . , that is, Westec, Four Seasons, Farrington Manufacturing, American Loan and Finance Company, Dolly Madison, and Equity Funding. [sic] This issue was not decided by the Bankruptcy Court or by any court. Why wasn't it decided? It wasn't decided because the question was settled." A. 252-253.

Los Angeles Land did not involve stockholders' attempts to obtain parity status with general creditors. In that case, purchasers of subdivided sections of real property were found to have a right of restitution of payments made under land sales contracts and, by reason thereof, were classified as general unsecured creditors.*

Even the two cases cited by appellants in which the claims of defrauded shareholders were accorded *pari passu* treatment with the claims of general creditors have no bearing on the issue before this Court. Those cases, *Oppenheimer* and *Insurance Investors Trust Co.*, were not Chapter X cases, and the courts there, unlike this Court, were not bound by the mandate of the absolute priority rule.

Moreover, *Oppenheimer*—far from supporting appellants' attempt to elevate themselves—merely held that a prior general creditor, who was fraudulently induced into converting his creditor claim into equity, was not deprived of his pre-existing status as a general creditor when he obtained rescission of the transaction which converted his creditor claim. *Oppenheimer*, the plaintiff, was originally a depositor of a national bank who was fraudulently induced into purchasing stock of the bank with the proceeds of his deposit. After the national bank became insolvent and entered insolvency proceedings under the National Bank Act, *Oppenheimer* paid the statutory assessment he owed as a shareholder, obtained rescission of the stock purchase and sought to have his judgment claim against the bank treated equally with the claims of its general creditors, including its other depositors. The Supreme Court held that plaintiff's judgment claim—the amount of his deposit wrongfully obtained—should be treated equally with those of other creditors (e.g., other depositors). To hold other-

* Certain of the land purchasers exchanged land sale contracts for investment contracts pursuant to which the debtor agreed to manage, subdivide and sell subdivided lots, as agent for the purchaser. The Court found that the investment contracts were securities and the holders of the contracts had the same right of rescission under Federal law as the holders of land sales contracts had under state law.

wise, of course, would have effectively denied rescission to Oppenheimer for he would not have been restored to the same position he had held prior to the rescinded transaction. Unlike Oppenheimer, appellants here do not seek restoration of a prior position as general creditors. Instead, appellants seek damages and elevation to a position they never held. As distinguished from the facts in *Oppenheimer*, appellants are demanding the right to receive distributions in respect of claims of \$100,000,000 which have been generated by speculative fluctuation in the stock market and have no relationship to the value received by the debtor for their stock.

B. The Absolute Priority Rule of Chapter X Dictates that Shareholders be Classified as Junior to General Unsecured Creditors.

Most importantly, however, *Oppenheimer* was not decided under the Bankruptcy Act which is the operative statutory framework within which the instant case must be decided. The significance of this difference was recently considered by Judge Wyatt in *In re Weis Securities, Inc.*, 425 F.Supp. 212 (S.D.N.Y. 1977), *appeal sub judice*, No. 77-6034 (2d Cir.). Addressing the attempt by defrauded subordinated creditors of a broker-dealer to avoid junior status, Judge Wyatt made the following comment on *Oppenheimer*:

"The Court of Appeals . . . ordered that the judgment be paid only 'after payment in full of all who were creditors when the bank became insolvent'. This deferment of the judgment was reversed by the Supreme Court which ruled that the judgment was entitled to parity with other unsecured creditors. This ruling was made, however, because Oppenheimer had already paid the statutory assessment against him. The significance for the case at bar is the repetition by the Supreme Court of the settled rule that fraud and the ability to rescind are of no avail to defeat protections by statute for a class of creditors." 425 F.Supp. at 217. (Emphasis deleted).

The instant case is controlled by the provisions of Chapter X of the Bankruptcy Act. The Congressional policy reflected in Chapter X requires that the classification of claims comply with the "absolute priority" rule which requires the claims of creditors to be paid in full prior to provision being made for participation by shareholders. Bankruptcy Act § 221(2). See *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106, 115-121 (1939); *Northern Pacific Railway Company v. Boyd*, 228 U.S. 482, 504 (1913).

In Chapter X, prior to the formulation of a plan, the court is required to divide creditors and stockholders into classes "according to the nature of their respective claims and stock". Rules of Bankruptcy Procedure, Rule 10-302(a). Consistent with the Court's Order of June 13, 1977 determining the value of Stirling's assets and the amount of Stirling's debts, the Court classified the "fraud" claims of shareholders against Stirling in accordance with the absolute priority rule by assigning to them a status junior to the claims of general unsecured creditors.

At least one court has recently found that appellants' interpretation of *Oppenheimer* is inapplicable to cases governed by the absolute priority rule by refusing to permit a defrauded stockholder to rescind his securities purchases and to reclaim the consideration paid for such securities. In the Chapter X reorganization proceedings of U.S. Financial, Inc., a defrauded shareholder who received his stock from the debtor in exchange for certain properties alleged that a group of insiders perpetrated a massive fraud on creditors and stockholders of the corporation. He thereupon sought to recover those properties from the debtor's estate. The court conceded that the plaintiff had a right of partial reclamation under state law, but held that the plaintiff's restitution claim could not be permitted in Chapter X without violating the absolute priority rule. The issue presented in *Kelce v. U.S. Financial, Inc.*, 3 Bankr.Ct. Dec. 507

(S.D. Cal. 1977) was similar to that presented in *Oppenheimer*, namely, whether a defrauded stockholder can rescind the purchase of his securities and state a claim for restitution or reclamation of the consideration paid in exchange for the shares. The plaintiff in *Kelce*, however, had not been defrauded of a prior creditor position. Like appellants here, he sought instead to elevate his status. As distinguished from *Oppenheimer*, in *Kelce*, a Chapter X case in which the absolute priority rule applied, the court found that although the stockholder had a right of reclamation, that right was subject to the absolute priority rule and thus did not permit the defrauded stockholder to elevate his status vis-a-vis other creditors of the estate.

In a Chapter X case, such as the case at bar, the absolute priority rule dictates the conclusion that defrauded shareholders be relegated to a position junior to general unsecured creditors. Among the equitable considerations that should be taken into account are the following:

(1) Granting Appellants' Request for Relief Could Increase the Cost of Credit.

In deciding whether or not to extend credit to a public corporation, the potential creditor weighs the possibility of the debtor's possible bankruptcy in his decisional calculus. The creditor often inspects the debtor's debt-to-equity ratio to ascertain whether an adequate "cushion" of equity exists so as to minimize his risk of loss. Thus, the creditor will extend credit in the belief that his claim will be satisfied before that of stockholders in the event of the debtor's insolvency.

Conversely, a stockholder invests in a corporation hoping that his capital investment will appreciate. Unlike an entity which lends money to a corporation or an entity which sells it goods or services, a stockholder may realize

unlimited gains on his investment. A stockholder invests in a corporation with knowledge that upon liquidation he will receive a liquidating dividend if, and only if, all claims of creditors are first satisfied.

The absolute priority rule allocates this risk of loss between general creditors and shareholders by requiring that, in Chapter X proceedings, the claims of general unsecured creditors be satisfied out of distributions from the debtor's estate before the claims of stockholders:

"In theory, the general creditor asserts a fixed dollar claim and leaves the variable profit to the stockholder; the stockholder takes the profit and provides a cushion of security for payment of the lender's fixed dollar claim. The absolute priority rule reflects the different degree to which each party assumes a risk of enterprise insolvency; no obvious reason exists for reallocating that risk."

Slain & Kripke, *The Interface Between Securities Regulation and Bankruptcy—Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors*, 48 N.Y.U.L.Rev. 261, 286-87 (1973).

Nevertheless, appellants argue that stockholders should not bear these economic risks of fraud and that they should be shifted to general unsecured creditors of the corporation. Not only is this manifestly unfair, but that position would have this Court reallocate the risk assumptions operative in the market place. The ultimate effect of this change on credit markets could result in higher costs of credit. In order to price the "new risk", creditors might be compelled to impose higher mark-ups or interest rates in order to compensate for the resulting uncertainty.

(2) Appellants' Position Results in Creditors Indirectly Sharing the Estate With Wrongdoers Against Whom Creditors Have Limited Remedies.

Under federal and state securities laws, defrauded shareholders may pursue certain judicial remedies against the debtor corporation's agents in order to recover their pecuniary losses, such as an action under Rule 10b-5 of the Securities and Exchange Act of 1934 against the debtor's underwriters. However, securities law remedies are generally unavailable to the ordinary creditors of the debtor corporation. In the event stockholders recover from an insolvent estate, that recovery will be used in mitigating damages in the stockholders' securities law action. Thus, if this Court adopts appellants' contention that the claims of defrauded shareholders should be accorded *pari passu* treatment with the claims of general unsecured creditors, the following will result: the creditors, by sharing their recovery from the debtor's estate with such stockholders, will be forced to contribute estate assets, by way of mitigation of damages, to wrong-doers against whom those creditors generally do not have securities law remedies and have only limited state law remedies.

C. The Adoption of Appellants' Proposed Reliance Standard Would (i) Render the Conduct of a Chapter X Proceeding Unmanageable and (ii) Distort the Realities of the Marketplace.

It is appellants' thesis that the priority of fraud claims is determined by the degree of reliance placed upon the subordinate status of stockholders by general unsecured creditors. Thus, appellants argue that claims arising before a capital contribution are not entitled to priority, presumably because the creditors furnishing credit prior to the capital contribution have not relied upon it in extending credit.

This reliance standard creates imposing obstacles to the orderly conduct of a reorganization proceeding. In finding

reliance in the case of one creditor and no reliance in the case of another, the court will also create circularity of priority problems. Employees, suppliers, lenders and other creditors who rely on a debtor's capital will have claims senior to those of rescinding stockholders whose claims will be *pari passu* with the claims of non-relying employees, suppliers, lenders, etc., whose claims are *pari passu* with those creditors who relied on shareholder equity.

The reliance standard urged by appellants i.e., that in respect of the offerings, creditors extending credit thereafter did not rely on the stockholders' capital, distorts the realities of the marketplace. Creditors legitimately expect that their claims against the debtor's estate will be satisfied before those of stockholders in an insolvency situation irrespective of whether the creditors extended credit before or after the capital was contributed. A similar notion of reliance was rejected by this Court twelve years ago in *In re Credit Industrial Corp.*, 366 F.2d 402 (2d Cir. 1966). In that case this Court was confronted with the issue of whether or not to require proof of reliance by a senior creditor upon a subordination agreement in determining whether to enforce such an agreement in favor of the senior creditor. In answering that question in the negative, this Court was duly concerned with the adverse impact on the credit market in the event it decided to require such proof:

"... [I]t is not without significance that subordinated debt such as that involved here is widely employed today in financing commercial enterprises To deprive lending institutions of the right to enforce lawful subordination agreements and require them to prove in each instance that they relied on such agreements in advancing funds to businesses would not only place in jeopardy literally billions of dollars of outstanding loans, but in all probability would prompt lending institutions to reconsider, and possibly curtail,

their subordinated debt-financing activities to the detriment of the entire business community." *Id.* at 410. (Footnote omitted).

POINT II

Contingent and unliquidated claims may be subordinated in Chapter X liquidations.

Appellants contend that in Chapter X, the court cannot disallow unliquidated and contingent claims because Congress intended that "all claims" must be dealt with in corporate reorganization cases. The issue in this case is not, however, whether Chapter X permits a plan of reorganization to provide for all claims against a debtor but rather whether the court must delay action on a plan of liquidation until contingent and unliquidated claims are fixed as to amount.

We submit that where a court determines that a debtor corporation is insolvent and cannot be rehabilitated, the court has discretion to apply section 57d* of the Bankruptcy Act and to disallow or separately classify unliquidated and contingent claims which would unduly delay distribution of liquidating dividend to creditors.

There can be no dispute that all creditors holding claims susceptible of proof and allowance should be permitted to

* "§ 57. Proof and Allowance of Claims.

* * *

d. Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

participate under a plan of reorganization if such corporation is permitted to continue in business as a rehabilitated going concern. But where a Chapter X court finds a debtor corporation to be insolvent and orders its assets liquidated, the same policy considerations should apply as in liquidating bankruptcy. No sensible distinction can be drawn between the two situations. Claims which would unreasonably delay consummation of a plan of liquidation in Chapter X and claims which would unduly delay distribution of an estate in liquidating bankruptcy should be similarly treated by the court so as not to delay distribution to general unsecured creditors. Appellants' contention that the Classification Order (which unquestionably disallowed their claims) is inconsistent with the provisions of Chapter X of the Bankruptcy Act, does not take into consideration Judge Burke's prior order that this debtor be liquidated.

Appellants contention that a bankruptcy court should not be permitted to disallow non-provable claims in Chapter X incorrectly assumes a reorganization in the case at bar. However, claims such as appellants' may be disallowed in straight liquidating bankruptcy. See *In re Cartridge Television, Inc.* 535 F.2d 1388, 1390-91 (2d Cir. 1976). If a bankruptcy court may disallow unliquidated and contingent stockholder fraud claims in a corporate liquidating bankruptcy, there is no reason in law or equity why a Chapter X court cannot subordinate and thereby disallow such claims upon a finding that the debtor should be liquidated and that liquidation of the fraud claims would unreasonably delay distribution to creditors who have waited over five years for payment of a portion of their claims.

Appellant's reliance upon *Collier* is in this case misplaced. *Collier* concludes that Section 57d does not apply in Chapter X because a confirmed Chapter X plan binds all creditors, even those whose claims are not allowed and are not allowable (Bankruptcy Act § 224(1)), and only

creditors whose claims are allowed may share in distributions (Bankruptcy Act § 224(4)). From this *Collier* concludes:

"Consequently, if § 57d were applicable and a claimant holding a contingent or unliquidated claim filed a proper proof, the result would be that if the trustee or debtor in possession . . . failed to object to the claim or seek its liquidation, the creditor's claim under § 57d would nevertheless not be allowed, the creditor would not share in the distribution and his claim would be discharged. . . . [S]uch an unjust result could hardly be countenanced. Yet if the court ordered the claim excepted from the discharge, the creditor would be unwarrantedly preferred, and if the claim was provided for in the plan the effect would be to ignore the proviso of § 57." 6 *Collier on Bankruptcy*, ¶ 9.06, at 1550-51, n. 19 (14th ed. 1977).

Obviously the author of the *Collier* note has presumed that the debtor will be reorganized. Unless the debtor survived confirmation of a plan, the creditor whose claim is "excepted" could not be "preferred". Where, as here, a debtor is being liquidated, the Chapter X court should be permitted to subordinate shareholder fraud claims which would unreasonably delay distributions to creditors. Judge Burke did not abuse his discretion in subordinating such claims.

POINT III

Appellants may not raise the issue of equitable subordination on appeal.

In Point III of their brief, appellants urge this Court to equitably subordinate the claims of the appellee Banks to the class which appellants purport to represent. However, since the issue of equitable subordination was not

raised in the court below, appellants should not be permitted to raise the issue *de novo* in this Court. *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972); *Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.*, 154 F.2d 814 (2d Cir.), *cert. denied*, 328 U.S. 859 (1946).

Further, in connection with the Trustee's attack on the validity of the secured position of the Banks, the Trustee asserted [albeit without conviction (A. 93-94)] that the Banks claims might be equitably subordinated. The settlement between the Banks and the Trustee, after a full hearing on notice to all creditors and shareholders (as of December 31, 1973) subsumed the settlement of the claim. The doctrine of *res judicata* precludes judicial consideration of appellants' contention that the Bank's claim should be equitably subordinated. See *Nichols v. Emerson*, 210 App. Div. 281 (3d Dept. 1924), *aff'd*, 241 N.Y. 531 (1925); *Mueller v. Elba Oil Co.*, 21 Cal. 2d 188, 130 P.2d 1961 (1942).

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the order appealed from be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2-14-78

-----x
: In the Matter of :
: STIRLING HOMEX CORPORATION, :
: Debtor :
: GREGORY JEZARIAN, GERALDINE JEZARIAN, :
: LONETOWN COMPANY, HARRY E. JONES, : CONSOLIDATED APPEALS:
: ALECK GOLDBERG, as Custodian for : 77-5019, 77-5022
: Mark Goldberg, and MRS. D. WINDSOR :
: DIXON, : AFFIDAVIT OF SERVICE
: Appellants, :
: FRANK G. RAICHLE, Reorganization Trustee; :
: LINCOLN FIRST BANK OF ROCHESTER; CHEMICAL :
: BANK; THE CHASE MANHATTAN BANK, N.A.; THE :
: FIRST NATIONAL BANK OF CHICAGO; MARINE :
: MIDLAND BANK; and THE TRAVELERS INDEMNITY :
: COMPANY, :
: Appellees. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PATRICK E. MEARS, being duly sworn, deposes and says:

On February 14, 1978, I served the Brief of Appellee
The Chase Manhattan Bank, N.A. on the attorneys listed below
by depositing two copies thereof securely enclosed in a post-
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New York, N.Y.

PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203

JOHNSON, REIF & MULLAN
47 Fitzhugh Street
Rochester, New York 14614

BROWN, KELLY, TURNER,
HASSETT & LEACH
290 Main Street
Buffalo, New York 14202

Patrick E. Mears

Patrick E. Mears

Sworn to before me

this 14th day of February, 1978

Antoinette M. Stallone

ANTOINETTE M. STALLONE
NOTARY PUBLIC, State of New York
No. 24-8150102
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978

CONSOLIDATED APPEALS:
77-5019, 77-5022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of

STIRLING HOMEX CORPORATION,

Debtor,

GREGORY JEZARIAN, GERALDINE JEZARIAN,
LONETOWN COMPANY, HARRY E. JONES,
ALECK GOLDBERG, as Custodian for
Mark Goldberg, and MRS. D. WINDSOR
DIXON,

Appellants,

FRANK G. RAICHLE, Reorganization
Trustee; LINCOLN FIRST BANK OF
ROCHESTER; CHEMICAL BANK; THE CHASE
MANHATTAN BANK, N.A.; THE FIRST
NATIONAL BANK OF CHICAGO; MARINE
MIDLAND BANK; and THE TRAVELERS
INDEMNITY COMPANY,

Appellees.

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AFFIDAVIT OF SERVICE

MILBANK, TWEED, HADLEY & McCLOY
1 Chase Manhattan Plaza
New York, New York 10005
(212) 422-2660
Attorneys for Appellee,
The Chase Manhattan Bank, N.A.